IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 442.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES J. CARROLL.

On Appeal from the United States District Court
for the Western District of Missouri.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

OPINION BELOW.

The oral opinion of the District Court (R. 66) dismissing the indictment in the instant case, No. 18,188, has not been reported.

JURISDICTION.

The order of the United States District Court dismissing the indictment was entered on August 11, 1952 (R. 65, 76). A notice of appeal was filed by the United States to this Court on September 8, 1952 (R. 65, 77). The Government has taken its appeal in this cause under Criminal Appeals Act, 18 U. S. C. 3731, on the ground that the dismissal of the indictment was based on the construction of the statute on which the indictment was founded. On September 23, 1952, the appellee filed a statement opposing the jurisdiction of this Court as to the first 45 counts of the indictment (R. 77), on the ground that as to these counts the dismissal of the District Court was not based solely upon the construction of the federal statute, but was based on the additional ground that the District Court had no jurisdiction over the person of the defendant, for the reason that jurisdiction did not lie in the Western District of Missouri. Further consideration of this jurisdictional question was, on December 15, 1952, postponed by this Court to the hearing of the case on the merits (R. 78).

QUESTIONS PRESENTED.

1. Whether a person failing to file Internal Revenue Service Form 1099, showing payments made by him to another person of $600.00 or more in fixed or determinable income for a given taxable year, is subject to the criminal provisions of Section 145 (a) of the Internal Revenue Code, which section makes it an offense to wilfully fail to make a "return" for the purpose of the computation, assessment or collection of a tax at the time or times required by law or regulation.

2. Whether an individual may be prosecuted under Section 145 (a) of the Internal Revenue Code in a separate count for each omission to report a payment made by him

during a given taxable year to another of fixed or determinable income of $600.00 or more.

3. Assuming a "return" within the meaning of Section 145 (a) includes a "return" within the meaning of Section 147 (a) of the Code, does such a "return" in the "form and manner" prescribed by the Commissioner, consist of Form 1099 alone, or does it not consist of Forms 1099 together with verified* Form 1096?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations which appellee deems pertinent to this appeal are set forth in the appendix to this brief, infra, pp. 41-45.

STATEMENT.

This cause originated by the filing in the District Court for the Western District of Missouri of two indictments against this defendant on December 14, 1951 (R. 1, 47). These indictments were numbered 18,188 and 18,189, respectively. The indictment in the instant cause, No. 18,188, consisted of 101 counts, charging the defendant (appellee) with wilful failure to make a return on Internal Revenue Service Form 1099 with regard to certain payments, which exceeded the sum of $600.00 in each instance, allegedly made by the defendant to certain named recipients during the calendar years 1948, 1949 and 1950. It was alleged in said indictment that the amounts of these payments together with the names and addresses of the recipients were required to be reported on said forms 1099 and mailed to the Commissioner of Internal Revenue, Processing Division, Kansas City, Missouri, on or before the 15th day of February following the year during which said payments were

* The term "verified" as used in this Brief with regard to Form 1096 refers to the execution of said form with a declaration under the penalties of perjury that it constitutes a true and complete document.

made. Counts 1 through 45 of the indictment concerned alleged violations in this regard by the defendant in the year 1948, and the remaining counts of this indictment concerned alleged violations by him in the years 1949 and 1950.

In the second indictment the defendant was charged in three counts with having wilfully failed to make a return on Internal Revenue Service Form 1096 for each of the three years, 1948, 1949 and 1950, and reporting thereon the total number of returns made by him on form 1099, attached thereto, for each of the three years in question. The indictment further charged that these forms 1096 together with the accompanying forms 1099 were required to be filed by the defendant with the Commissioner of Internal Revenue, Processing Division, Kansas City, Missouri, on or before the 15th day of February following the year in which these payments were allegedly made.

The recipients named in this second indictment, in the three counts thereof, were the same individuals whose names were set out in the 101 counts of the first indictment. The same 101 transactions which were charged in the first indictment were merely assembled by year and charged again in the three counts of the second indictment.

Each count of the first indictment (the one presently before this Court) (R. 1) alleged that under the provisions of Section 147 of the Internal Revenue Code and Treasury Regulation 111, Section 29.147-1, the defendant was required to "make a return" on Internal Revenue Service Form 1099, and that his alleged failure so to do violated the provisions of Section 145 (a) of the Internal Revenue Code. Each count of the second indictment (R. 47) alleged that under the same statute and Treasury Regulations the defendant was required to "make a return" on Internal Revenue Service Form 1096, and his failure so to do

similarly violated Section 145 (a) of the Internal Revenue Code.

On January 31, 1952, the defendant filed separate motions to dismiss each of the aforementioned indictments (R. 53, 58). These motions to dismiss asserted inter alia that each count of the two indictments did not allege sufficient facts to constitute an offense against the laws of the United States, and further that the Court had no jurisdiction over the person or subject matter for any alleged offense. Thereafter, on August 11, 1952, the defendant filed supplemental motions to dismiss the indictments (R. 63, 64) in which among other things it was alleged that the District Court of the Western District of Missouri had no jurisdiction over counts 1 through 45 of the first indictment and count 1 of the second indictment for the further reason that as to the year 1948 the Treasury Regulations provided that Internal Revenue Service Forms 1099 and 1096 should be filed with the Commissioner of Internal Revenue, Processing Division, New York City, New York.

The hearings on these motions to dismiss the two indictments were consolidated and heard by the Court on August 11, 1952 (R. 65). Following arguments by the Government and by the defendant, the Court sustained the motions to dismiss as to all 101 counts of the first indictment, and as to the first count of the second indictment (R. 65).

In ruling on the defendant's motions to dismiss, the Court stated in its oral opinion (R. 66-69) that the failure to report each payment of $600.00 or more on the 15th day of February following the year in which the payment was made does not constitute a separate and distinct offense. The Court held also that the statute intended that an individual be required to file only one annual return, asserting:

> "I think that form 1096 is the form that is anticipated required by the statute and that the information

which has been described here as being required in form 1099 as a part of 1096. I don't think they are separate and distinct. I think that it is one. I think that 1096 is the one that the law requires and that the information contained in 1099 must be made a part of 1096. I think if that information is not contained in 1096, that the person who is required to file the form might be indicted for making a false return and not for a separate and distinct offense'' (R. 66, 67).

The Court thereupon sustained the defendant's motion to dismiss the indictment in cause No. 18,188, and then in considering the second indictment began to discuss the question of jurisdiction. In this regard the Court held that, as to the year 1948, the Treasury Regulations then in effect required that the Internal Revenue Service Forms 1099 and 1096 be filed in New York City rather than in Kansas City, Missouri, and that therefore there was no jurisdiction in the Western District of Missouri for the first count of the indictment. The Court took judicial notice of the Treasury Regulations requiring the filing of the forms in question with the Processing Division in New York City for the calendar year 1948, and also of the regulation, approved on February 16, 1949, under T. D. 5687, 1949-1 Cum. Bull. 9, which Amended Regulation 111, Section 29.147-1, changed the place where these forms were required to be filed from New York City, New York, to Kansas City, Missouri. The Court thereupon sustained the motion to dismiss the first count of the indictment.

Counts two and three of the second indictment were upheld by the Court and the defendant's motion to dismiss these counts was overruled (R. 65). The Government has taken no appeal from the dismissal of the first count of the second indictment and counts two and three of said indictment are presently pending in the said District Court for the Western District of Missouri.

SUMMARY OF ARGUMENT.

Form 1099 is not a return within the meaning of Section 145 (a) of the Internal Revenue Code, which section imposes criminal penalties for failure to file returns such as individual income tax returns, fiduciary returns, corporation returns, and declaration returns of estimated tax. The return within the meaning of that section is that type of document filed by any person subject to a tax liability relative to his own tax liability, and is the form from which the net taxable income of a person is computed, assessed, and subject to collection.

The statutory language of Section 145 together with the Regulations issued under this statute both indicate that a "return" is an income return. Regulation 111, Section 29.145-1 mentions only that a tax payer is subject to penalties under Section 145 (a) as to his own income.

Other sections of the Code indicate that "return" means an income return within the provisions of Section 145. Thus, Section 55 dealing with the public record and inspection of returns speaks of the return upon which the tax has been determined. T. D. 4929, issued under Section 55, stated that information returns, schedules, lists and other statements are designed to be supplemental to or become a part of the return. This then is an administrative interpretation that there can only be one return for a taxable year. A "return" must be signed under oath or under a declaration that it is executed under penalties of perjury. Form 1099 contains no provision for its execution under oath or declaration, nor indeed does it contain any place for a signature. Other so-called informational returns either require an oath or are of such a nature as to make the computation, assessment and collection of the tax possible from an inspection of one document.

The executive departments charged with the administration and enforcement of the Act have not given indi-

viduals any "fair warning" that their conduct in not filing the information required by Section 147 constitutes a violation of Section 145. The executive departments further have uniformly construed the criminal penalties of Section 145 as not including the filing of the forms in question. The lack of recognition under the voluntary disclosure policy of the Bureau of Internal Revenue that the failure to comply with the provisions of Section 147 was a criminal offense is an administrative determination which supports the foregoing conclusion. The history of the various income tax laws indicate that there can be only one failure or default to file a return which would subject an individual to a penalty under the provisions of Section 145 (a) during a given taxable year. Under the Revenue Act of 1913, which established the current income tax law, the payor was required to file a return for the recipient of the income. If the recipient wished to acquire any deductions he was required to file a claim with the payor and this became a part of the payor's return. These withholding provisions were eliminated by the Revenue Act of 1916. However, withholding provisions were carried on throughout the years in regard to non-resident aliens. Section 143 of the present Internal Revenue Code provides for the withholding tax at the source for non-resident aliens. Under subsection 143 (e) if the recipient pays the tax, the withholding agent is not subject to any penalty. The failure of the Revenue Act to include a similar provision in dealing with information required by Section 147 indicates that there is no penalty for failure to file any information under that section.

If the failure to comply with Section 147 constitutes a failure to file a "return" within the meaning of Section 145 of the Code, there can be but one such failure for each taxable year. Section 147 provides that a "return" thereunder shall be in the "form and manner" prescribed by the Commissioner. The Commissioner has prescribed that

the information required under Section 147 shall be submitted on Form 1099 accompanied by verified Form 1096. It is accordingly submitted that a Section 147 "return" in the "form and manner" prescribed by the Commissioner consists not of Form 1099 alone, but of Form or Forms 1099 together with a single verified Form 1096.

The fact that the Regulations under Section 148, which also requires Forms 1096 and 1099 to be filed, refer to "the return" in speaking of extensions allowed by the Commissioner is also an indication that there can be only one omission per taxable year. The fact that there is only one oath or verification required per taxable year and that that verification or oath is on Form 1096 indicates again that there can be only one offense per taxable year.

The failure to file a group of returns attached together at a given time and at a given place is only one failure. Since it is only one failure, it is the result of but a single impulse or purpose. Even if the filing of these forms is not considered to be one failure, it certainly must be construed as a "course of conduct," as that term is described in the case of United States v. Universal C. I. T. Credit Corporation, 344 U. S. 218.

It would be anomalous to hold that an individual who fails to file the information required by Section 147 would be subject to a more severe penalty than an individual who fails to file his own individual income tax return, especially since there is no clear Congressional mandate warranting such an interpretation. If Congress had intended to make the filing of each one of these forms a separate offense, it could have done so by clear and unambiguous language. Its failure so to do indicates that at the most, there can be only one offense per taxable year.

ARGUMENT.

I.

A person failing to file Internal Revenue Service Form 1099, showing payments made by him to another of $600 or more of fixed or determinable income for a taxable year is not subject to the criminal provisions of Section 145 (a) of the Internal Revenue Code.

The appellee in the instant case has been charged with the violation of Section 145 (a) of the Internal Revenue Code, by failing to file Internal Revenue Service Form 1099, setting forth information required by Section 147 of the Code. It is the appellee's contention that such failure to file these forms can not be considered an offense so as to subject the party failing to furnish such information to the penal provisions of Section 145 (a).

The "return" required by Section 145 (a) is an income return of the type required by Section 51 of the Internal Revenue Code. A return thus can be defined as the annual disclosure by the taxpayer of the relevant facts of his income. Compare Helvering v. Mitchell, 303 U. S. 391, 399. In other words, it is the type of report or form prepared by the recipient of the income for the purposes of the computation by that person of his own tax liability, and for the purposes of the "computation, assessment or collection" of that person's tax liability by the Government. Section 145 (a) imposes criminal penalties for failure to file returns such as individual income tax returns, fiduciary returns, corporation returns, and declaration returns of estimated tax. Appellee is corroborated in this contention by the language of related provisions of the Internal Revenue Code, by the historical background of the income tax law, and by the Treasury Regulations and administrative interpretations of the Act.

1. The very regulations issued by the Treasury Department with regard to Section 145 of the Code themselves indicate that Section 145 (a) relates to returns relative to the taxpayer's own income. Regulation 111, Section 29.145-1 does not mention that the failure to furnish information under Section 147 constitutes an offense under Section 145 (a). Indeed there is no mention made concerning the furnishing of information regarding the payees of the taxpayer. That Regulation states in part:

> "The wilfull failure of a taxpayer to give information required in **his** return as to advice or assistance rendered as to advice or preparation of the return, and the wilfull failure of the person preparing a **return** for another to execute the sworn statement required with reference thereto, makes such persons subject to the penalties imposed by Sec. 145 (a)." (Emphasis supplied.)

And the last sentence of this regulation provides:

> "The privilege against incrimination in the Fifth Amendment to the Constitution is not a defense to a charge of failure to file a return, and does not authorize a refusal to state the amount of the income, though the taxpayer's income was made through crime."

Obviously, therefore, all of the provisions relative to the penalties set out in Section 145 (a) for the failure to make a return deal solely and exclusively with the punishment prescribed for a party's failure to make a return to the Government as to his own income, and could not, therefore, deal with the type of information required in Section 147 of the Internal Revenue Code.

Aside from the Treasury Regulations, however, it is urged that the very provisions of the Internal Revenue Code itself lend strength to the appellee's assertion herein that the information required under Section 147 is not the

type of return referred to under the penal provisions of Section 145 (a).

Turning our attention first to Section 145 (a) itself, it is apparent that the whole tenor of this Section relates to frauds and "potential" frauds committed by persons with regard to their own income tax liability. Section 145 (a) makes it an offense: 1) to fail to pay a tax,[1] 2) to fail to make a return or declaration for the purpose of the computation, assessment or collection of a tax,[2] 3) to fail to keep any records for such tax purposes, and 4) to fail to supply information for such purposes.[3] It is significant that that section deals with a specialized return for the purpose of the computation, assessment or collection of a tax. In other words, those terms taken together indicate that the purpose of the return itself is the levy of a tax, rather than the verification of a tax. With reference to Form 1099, here in issue, and required under Section 147, it should be noted that it deals with disclosure relative to the tax liability of persons other than the taxpayer, and is not subscribed or even signed by the person making the payment therein set out. Indeed there is no place on the Form itself[4] for such a signature or subscription.[5]

2. That the word "return" as used in Section 145 of the Internal Revenue Code means an income return is further corroborated by its use in various other sections of Chapter 1 of the Code. Section 51 of the Code provides for the filing of a "return" dealing with one's own tax liability, for it requires the furnishing of the amounts of one's gross income and the deductions and credits per-

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1 Cf. Spies v. United States, 317 U. S. 492, 496.

2 United States v. Sullivan, 274 U. S. 259, 262.

3 United States v. Murdock, 290 U. S. 389, 391.

4 Government's Brief, page 45.

5 The reverse side of Form 1099, which indicates that individuals must file income tax returns, lends further weight to the argument that Form 1099 is not the return referred to in Section 145 (a) of the Code.

mitted under the law. It specifies that the return shall be verified by a written declaration that it is made under the penalties of perjury. Section 52 provides for the making of a return by a corporation and requires the stating therein of the amount of the corporation's gross income and its deductions and credits. It similarly must be sworn to by various officers of the corporation. Section 53 provides that "returns" shall be made to the Collector for the District in which is located the legal residence or principal place of business of the person making the return. In the case of the forms required to be furnished under Section 147 of the Code on the other hand, the forms are filed with the Commissioner of Internal Revenue. It is obvious that the reason for this is that the "return" is furnished and mailed to the Collector of Revenue for the purpose of the collection of the tax which is due from the sender of such returns. The forms provided by Section 147 are sent to the Commissioner and are apparently used in verifying the income tax returns of others.

Section 54 of the Code provides that "every person liable to any tax" or for the collection thereof shall keep records and make "returns" as the Commissioner may prescribe. The person who is not therefore subject to any tax liability under the chapter would not be required to make a "return."

Section 55 of the Internal Revenue Code deals with the penalties prescribed for Federal employees and other persons for disclosing information as to such returns. It is quite pertinent and important to note that the Treasury Regulation under this Section, being Regulation 111, Section 29.55 (b)-1 provides:

> "For the purposes of this Section the word 'returns' shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of income returns."

Thus for the purpose of insuring the secrecy of written statements filed with the Commissioner, the Treasury Department has seen fit to specifically include such statements under the protection of this statute. It is particularly significant that such a Treasury Regulation defining returns as that last quoted does not appear in the Treasury Regulations pertaining to Section 145 of the Internal Revenue Code. Certainly, if the Treasury Department believed it necessary, in discussing the secrecy of returns, to state specifically that for the purposes of that Section the returns should include information returns and other written statements filed with the Commissioner, a fortiori should such a regulation have specifically been made to bring Form 1099 within the provisions of the returns required under Section 145 (a) of the Code. Again at Section 463C.35, T. D. 4929, 1939—2 Cum. Bull. 91, 96, the Treasury decision dealing with the publicity of returns, reference is made to such returns as an individual's return, partnership returns, returns of estates, trusts, corporations, associations, joint stock companies and insurance companies, and the decision states that for the purpose of that section, being Section 55 of the Code, information returns, schedules, lists and other statements which are designed to be supplemental to or to become a part of the returns shall be subject to the same rules and regulations as to inspection and publicity as are the returns themselves. Also under Executive Order 8230, August 28, 1939, T. D. 4945, 1939-2 Cum. Bull. 97, it was ordered that the following designated returns made under the Internal Revenue Code shall be open to inspection in accordance with the rules prescribed by the Secretary of the Treasury in the Treasury decision above referred to, namely, income, excess profits, capital stock, estate, and gift tax returns, and returns of employment tax on employers.[6]

[6] Other executive orders dealing with inspection of returns also do not recognize any separate "information return." Executive Order 10132, June 17, 1950, T. D. 5793, 1950-2, Cum. Bull. 37; Executive Order 10275, July 25, 1951, T. D. 5848, 1951-2, Cum. Bull. 47.

Continuing with other related provisions of the Internal Revenue Code, Section 142 thereof providing for the filing of fiduciary returns indicates that a fiduciary shall file a return for any individual estate or trust for which he acts, setting out therein the items of gross income and the deductions and credits. Section 143 provides for the deduction and withholding of a tax by a person making payments of fixed or determinable income to non-resident aliens and the making of the return of such payments by March 15 of each year. The return therein required is thus somewhat similar to the individual return required in Section 51 of the Code, and must similarly be filed with the Collector of Internal Revenue.

Significantly Section 143 (e)[7] provides that if any tax is required to be withheld, and it is actually paid by the recipient of the income, it should not be again collected from the withholding agent, "nor in cases in which the taxes are so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same unless such failure was fraudulent and for the purpose of evading payment." That section indicates a legislative intent not to impose any penalty upon any withholding agent when the recipient pays the proper amount of the tax. Thus, if Section 145 (a) applies to returns under Section 143, then a withholding agent would not be subject to any penalty if the recipient pays the proper amount of the tax. It would follow that, since Section 143 (e) relieves the withholding agent of any penalty for faiure to return or pay the tax and since there is no corresponding provision for information furnished under Section 147, therefore Section 145 (a) could not be held applicable to Section 147. Otherwise a person failing to furnish information under Section 147 would be subject to a more severe penalty than a tax withholding agent.

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7 This provision has been carried in prior Revenue Acts, e. g., Section 221 (1), Revenue Act, 1918, 40 Stat. 1072.

Section 276 of the Code deals with assessment of the tax in the case of a "false or fraudulent return." It obviously refers to the one annual income tax return.

Section 291 deals with interest and additions to the tax which are assessed in case of "failure to make and file return required by this chapter" within the time prescribed by law.[8] This obviously refers to a return of one's own income tax, because the percentage assessments of interest are computed on such income tax of the individual.

A significant section of the Code relative to the meaning of a "return" is Section 3603 found in Chapter 34 of the Code, which provides that the Commissioner of Internal Revenue may require any person to "make a return," keep records or render certain statements under oath as the Commissioner "deems sufficient to show whether or not such person is liable to tax."

Many other provisions of the Internal Revenue Code also reflect this interpretation of the term "return" and completely negative the contention of the Government that the information required to be supplied under the provisions of Section 147 come within the penal provision for the failure to make a return as set out in Section 145 (a) of the Code.[9] From the foregoing it is apparent that the word "return" as used in Section 145 (a) of the Internal Revenue Code has reference to an income return, and such a return as is required for the collection, assessment and determination of the income tax of that person, partnership, corporation or other entity preparing and filing said return.

3. There are to be sure other sections of the Code which require the filing of so called information returns. How-

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8 A purported income tax return which was neither signed nor verified was not a return required by the Revenue Act. Plunkett v. C. I. R., 1 Cir., 118 F. (2d) 644.

9 Other sections of the Internal Revenue Code relative to income tax, and which use the word "return" are Sections 3611-3614, 3634, 3616.

ever, those information returns are in themselves income returns, and generally the statutes or the regulations issued thereunder provide whether or not a penalty is applicable. For example under Section 153 of the Code, certain information is required to be furnished by various tax exempt organizations and certain trusts. This statute specifies in detail the information required to be furnished, but in the same section expressly states that a wilful failure to furnish the information required subjects the violator to the penalties provided in Section 145 (a). The return required under this section can also be considered to be in the nature of an income return, even though Congress has exempted these organizations from taxation. Similarly Section 187 of the Code requires certain partnership returns. This section requires a partnership to make a return for each taxable year showing specifically the items of its gross income and deductions. That return also has to be sworn to by one of its partners. This, it can be seen, is an income return, even though partnership returns are not in themselves taxable, for the net income of a partnership is computed generally in the same way as that of an individual. Also the return must be sworn to and filed with the Collector, as distinguished from the forms 1099 required under Section 147.

Section 500 of the Code places a surtax on personal holding companies. Section 508 states that all provisions of the law including penalties applicable in respect to the income taxes imposed under chapter one are applicable to this surtax. Regulation 111, Section 29.508-1, specifically states that the income tax penalties imposed under chapter one apply to the surtax. Here again this return is an income return although of a special nature made for the purpose of additional income tax. The form required under these sections of the Code is form 1120H and is a form which has to be verified just as a normal income tax return. From these related sections it can be seen that a

return, particularly as that term is used in Section 145 (a), is a document dealing with the recipient's own income, and which must be filed under oath, and is different from the information required under Section 147. Further, it should be noted that in the Internal Revenue Code there is no instance where criminal penalties are imposed for the doing or the failing to do an act without the concurrent imposition of civil penalties, and a reading of the Code indicates that no civil penalty whatever is imposed for violation of Section 147, whereas criminal sections of the Internal Revenue Code do refer to the imposition of other penalties. Indeed under the very withholding income tax law which the Government relies on (Government's Brief, page 29) in support of its contention that there is more than one offense in a given year, it is to be noted that that section as well provides for the imposition of a civil penalty as well as a criminal penalty for the violation of its provisions. Title 26, U. S. C. 1631.

4. Certainly under the reasoning set forth in this argument it cannot be said that an individual has "fair warning" of his being subjected to a criminal prosecution under Section 145 (a) of the Code by reason of his omitting to file the informational forms required by Section 147. And certainly the administrative interpretation of these sections has not been consonant with the application of the penal provisions of Section 145 (a) to the omissions here referred to. For there appears to be no reported case in which the Government has sought by criminal action to enforce the provisions of Section 147 of the Code, and such fact cannot be discounted in determining whether the failure to perform such acts as are set out in that statute subject one to criminal prosecution. As was stated in the case of United States v. Farrar, 281 U. S. 624, in considering the popular construction of the National Prohibition Act by prosecuting officers over a ten year period:

> ". . . during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form."

There is no reported case indicating that a criminal prosecution has ever been undertaken by the Government in an instance like the present one, and Congress, well aware of this fact, has never sought to change the pertinent provisions of Section 147 or to declare therein that failure to file such informational forms shall be considered a violation of Section 145.[10]

Also until 1952 it had been the established policy of the Bureau of Internal Revenue to permit an individual voluntarily to disclose to Treasury representatives either that he had wilfully failed to file an income return or that the income return which he had filed was fraudulent, and thereby no criminal prosecution would be recommended.[11] Thus, the fact that the Treasury Department permitted criminal immunity for voluntarily disclosing a failure to

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[10] See United States v. Murdock, 290 U. S. 389, where the defendant was prosecuted for failure to supply information as to deductions claimed, but was not prosecuted for failure to file Forms 1099; United States v. Sullivan, 274 U. S. 259, where the prosecution was apparently on the theory that Section 145 (a) referred only to income returns.

[11] Statements of the policy were announced as follows:

Secretary of the Treasury Morgenthau, "Daily Report for Executives," A-21. Bureau of National Affairs, May 28, 1945;

Secretary of the Treasury Vinson, as reported in the Washington Post, August 21, 1945;

Secretary of the Treasury Snyder, as reported in the New York Times, August 8, 1946;

J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, speaking before the 1947 Tax Executives Institute, New York City, reprinted in 25 Taxes 485.

The Treasury Department announced in S-2930, January 10, 1952, that it had abandoned the policy.

file an income return or the filing of a fraudulent income return would, since no such procedure existed in the case of the instant informational forms, indicate a recognition by the Treasury Department that the failure to file such informational forms did not constitute a criminal offense.

To rule now after a long period of non-enforcement that the failure to comply with the requirements of Section 147 constitutes a criminal offense would certainly create injustice and confusion among the vast majority of taxpayers. See Zellerbach Paper Company v. Helvering, 293 U. S. 173, 178, wherein this Court discussed the question of whether the passage of a retroactive income tax law required the filing of a new income tax return for the retroactive period and so tolled the running of the statute of limitations. In ruling that it did not, this Court held that to justify such a holding the statute would have to be very plain in that respect, and that the statute must leave no doubt in the mind of the average man that he was subject to such duty. The Court said that perhaps thousands of taxpayers, though innocent of wilful wrong, would be deprived of the protection of any rule of limitation and would incur other penalties unwittingly. Similarly in the instant case a statute which does not clearly make its violation a criminal offense and which has never been enforced as such ought not be made "an instrument for so much of hardship and confusion." Zellerbach Paper Company v. Helvering, supra. This should especially be true since, if Congress had intended that criminal liability attach to the failure to comply with Section 147, such a provision could easily have been included therein. The taxpayer is not given the adequate fair warning which is a prerequisite for the incurrence of criminal liability. United States v. Cardiff, 344 U. S. 174.

5. Further indication that criminal penalties do not and should not result from the failure to comply with provi-

sions of Section 147 of the Code is supplied by the case of McDonough v. Lambert, 1 Cir., 94 F. (2d) 838, in which case the Government sought a subpoena duces tecum to require the furnishing of certain books pertaining to payments made by the McDonough Company and charged on their books as legal expenses. The Circuit Court of Appeals for the First Circuit vacated the subpoena duces tecum and said that the Government had failed to make use of the existing statutory provisions authorizing the acquisition of such information. It went on to discuss Section 147 of the Code, and said that if the information were not supplied under that Section, the Commissioner of Internal Revenue or his special Agent might demand that the forms be filed and that if the party continued to refuse to file the same, the Commissioner might issue a summons requiring him to appear before him and give such testimony. If such procedure failed the Commissioner might then request that process be issued and that the party be required to appear for such testimony. That Court also stated that by adopting this method of procedure each section of the statute would fulfill its function. Obviously the Court recognized that there was no criminal liability in the failure to comply with Section 147, and indeed the Government itself must have recognized this fact for it apparently filed no criminal prosecution in that case, which seems to be one of wilful failure to supply the information here in question. To construe the sections of the instant statute otherwise is to abuse its wording and the interpretation made thereunder and to read into the section something which Congress could easily have supplied if it had so intended. The case of Appeal of the National Concrete Company, 3 B. T. A. 777, lends further weight to the argument that we are not here dealing with a criminal offense, since in that case the Board of Tax Appeals held merely that by ignoring the requirements of that section of the internal revenue statute which is now

Section 147 the taxpayer had waived the right to claim such expenditure as a deduction on his income tax. There was apparently no criminal prosecution, however, in that case and the Court made no mention of its applicability to such a statute. Obviously from a reading of these decisions and administrative authorities it is apparent that the purpose of the statute is fulfilled by the Government's ability to obtain such information by civil process and that no criminal liability was ever intended for its violation. A pertinent discussion of the section involved and a striking example of the fact that the statute was intended only for civil and administrative purposes may be found at S. Rep. No. 617, 65th Cong., 3rd Sess., 1939-1 Cum. Bull. (Pt. 2) 117, 124, Revenue Act of 1918, wherein it was said that returns of such information were to be made only to the extent prescribed by the Commissioner with the approval of the Secretary, **in order not to burden taxpayers with the labor and expense of furnishing useless information.**

The Government at page 26 of its Brief has stated that the importance of the information forms here in issue may be determined from the number filed during the years 1948, 1949 and 1950. The Government fails to state, however, how many of the indicated forms were filed by individuals as contrasted with the number of forms filed by corporations. The Government likewise fails to indicate the number of such forms which were filed under the statutory section with which we are here concerned. Rather, it is interesting to note in contrast that during the year 1948, one of the years mentioned by the Government, there were 52,072,006 individual income tax returns filed.[12] The Annual Report of the Commissioner of Internal Revenue in its list of returns and declarations filed does not

12 Statistics of Income for 1948, Pt. 1, Preliminary Report of Individual Income Tax Returns and Taxable Fiduciary Income Tax Returns filed during 1949. Prepared under direction of Commissioner of Internal Revenue by the Statistical Division.

include Form 1096 and Form 1099, although employers withholding statements are included.[13]

Appellee has shown that the failure to file informational Form 1099 could not be considered an offense under the penal provisions of Section 145 (a) of the Internal Revenue Code. This form is not made under oath and is merely attached to Internal Revenue Service Form 1096. Thus if there is any offense whatever committed by an omission to furnish the information required in Section 147, it is by the failure to file Form 1096, as the District Court indicated, rather than the more accompanying Form 1099. A different interpretation should not be permitted in the instant case without a clear, unambiguous and unequivocal mandate from the Legislature.

II.

Under any circumstances, there can be but one prosecution for failure to furnish the information required in Section 147 of the Internal Revenue Code relative to the payments described therein which are made during a given taxable year.

Appellee has argued in the preceding section of this brief that the penal provisions of Section 145 (a) of the Code cannot be applied to prosecute an individual for his failure to furnish the Commissioner of Internal Revenue with the information required by Section 147 of the Code. Appellee further contends, however, that even were it to be held that an omission to furnish the information under Section 147 constitutes an offense within the penalty provisions of Section 145 (a) of the Code, nevertheless the failure to file such information as is required by Section 147 can constitute only one offense during any taxable year. In the causes pending in the trial Court, the Gov-

[13] E. g. Treasury Department Annual Report of the Commissioner of Internal Revenue, Fiscal Year ending June 30, 1947, p. 20 (1948).

ernment has sought in three separate counts of the second indictment not only to prosecute the defendant for his failure to furnish such information as to his transactions in 1948, 1949 and 1950, but also in a separate indictment, that is, the one presently before this Court, the Government has also sought to utilize the very same payments and the very same transactions which are set out in the three counts of the second indictment to prosecute the defendant in 101 counts in this indictment for each individual payment allegedly made by him during the three years in question. It is the contention of this appellee that the language of the statute in question, the administrative regulations issued thereunder, the legislative history, and the decisional authority of this Court lead to a conclusion that if an offense has been committed by the failure to file Internal Revenue Service Forms 1099 and 1096, only one such offense could have been committed during any one taxable year.

1. The Government contends in its Brief before this Court that the language of Section 147 of the Code plainly contemplates the filing of an individual information "return for each individual payee." However, a closer examination of this Code section reveals that the term "return" used in that section could only be meant to apply to all payments made by an individual during a given taxable year. The Government at page 19 of its Brief has set out only portions of Section 147 (a). Said Section 147 (a) is set out in full in the Appendix to this Brief, infra, p. 42, and it is significant to note that the heading of said Section 147 (a) is "Payments of $600 or more." The body of the section goes on to indicate that a person coming within the requirements of the statute shall render a "return" to the Commissioner for such payments. Furthermore, although the section begins with the provision that all persons making the required payment to another person shall file such a return, yet it is noteworthy that the sec-

tion provides that in the case of such "payments" made by the United States or its officers or employees the same requirement as to the filing of a return is provided. Certainly it could not have been intended that as to a private individual this section requires the filing of a return for each individual payment, whereas in the case of the United States Government, its officers or employees, it contemplates the filing of a return for all the payments made during a given year. Furthermore the "return" mentioned in the section itself, as indicated in the preceding argument in this brief, is not the type of return set out in Section 145 and is merely a non-technical term used to signify the furnishing of information as to payments made to others.[14]

Also the language of this section prescribes the furnishing of a return "under such regulations and in such form and manner and to such extent as may be prescribed by the Commissioner of Internal Revenue." The regulation requires that they shall be accompanied by Form 1096. The "form and manner" prescribed by the Commissioner consists of verified Form 1096 together with Forms 1099. Accordingly, a violation of Section 147 must consist of a failure to render a return in the "form and manner" prescribed by the Commissioner and approved by the Secretary. The form and manner prescribed is not merely the return of Form 1099. It requires both forms. Forms 1099 and one Form 1096 constitute the "return" referred to in Section 147 because it states that the "return" shall be in such "form and manner" as prescribed by the Secretary. The Forms 1099 and the verified Form 1096 are as much a part of the "return" prescribed by the Commissioner as would be the several pages or schedules on an ordinary income tax return. An income tax return might by a regulation be made to consist of several separate documents but it would still be one "return". Obviously Con-

14 Florsheim v. United States, 280 U. S. 453.

gress could not have intended that the number of offenses which the Statute contemplated was to be left to the whim and caprice of the Commissioner in his determination that for his own convenience each payment should be set out on a separate Form 1099. Even assuming that the Congress could delegate to the Commissioner of Internal Revenue the power to designate the number of crimes within the meaning of a certain statute, yet such a serious delegation of authority should not be interpreted from a statute unless the language thereof contains a clear mandate to the Commissioner in this regard. Further, an inspection of the forms which the Commissioner has caused to be issued for the furnishing of such information indicates that the Commissioner himself contemplated only the filing of one set of information rather than the filing of separate information as to each particular payment. It is to be noted from Form 1096, set out at page 47 of the Government's Brief, that this constitutes a summary of the payments set out on Forms 1099 and that this is the only form required to be signed and verified by the individual preparing the form. Nowhere on Form 1099 does there appear any space for the execution or verification of the same by the payor, and, further, on Form 1099 the instructions state that "these forms must be forwarded with **return** Form 1096 to the Commissioner of Internal Revenue . . .", whereas, on Form 1096 the verification refers to Form 1099 as the "accompanying reports." A form which is merely an "accompanying report" and which does not even require the signature or verification of the maker thereof should not constitute a criminal offense against the laws of the United States.

The Regulations issued by the Treasury Department under Section 147 lend further weight to the authority that only one offense could have been intended within the provisions of that section. For Regulation 111, Section 29.147-1, which provides for the filing of Forms 1099 and

1096, also states that the same information with respect to "distributions to beneficiaries of a trust or of an estate shall be made on Form 1041 **in lieu of** Forms 1099 and 1096." Schedule G of Form 1041 provides a list for the inclusion on one form of all of the payees as well as the amounts paid to them. Obviously the failure to file such form could only be considered one offense, and if, in that case, Form 1041 can be filed in lieu of Forms 1099 and 1096 it would be incongruous to hold in the case of Form 1099, merely because the Commissioner has prescribed individual forms for each payment, that the failure to file each particular form for each particular payment constitutes a separate offense.

Section 148 of the Code also requires the filing of Forms 1099 and 1096. That section requires certain corporations to furnish information. Thus under Section 148 (a) corporations when required by the Commissioner must render a return verified under oath showing payments of dividends. Regulation 111, Section 29.148-1 requires information on Forms 1096 and 1099 concerning corporate distributions amounting to $10.00 or more during the calendar year beginning 1951. Prior to that time returns were only required in case of payments amounting to $100.00 or more. It is noteworthy that Section 29.148-1 (c) of the Regulation provides "that in any case in which it is impossible to file the return within the time prescribed in this section, the corporation may upon a showing of such fact obtain a reasonable extension time for filing a return." It is clear under this section that the Commissioner is treating the information under Forms 1096 and 1099 to be one return. This subsection then allows an extension of time for a period not exceeding six months. Section 148 also requires information respecting a contemplated dissolution or liquidation. The information required under this subsection has to be rendered under oath and furnished on Forms 1096 and 1099. Section 148 (f) requires information from

corporations relative to patronage dividend. Under Section 29.148-4 of the Regulation, Forms 1099 and 1096 are required to be used. Subsection (c) of this regulation again provides for an extension when it is "impossible to file a return within the time prescribed." Here again is an indication that only one verified "informational return" is required. It is apparent then from the foregoing that if the omission to file Forms 1096 and 1099 is a crime, there can be only one act of omission per taxable year since all the forms are required to be filed together at the same time and at the same place. And since there can be only one act of omission, there can be only one offense.

2. In any event, if the Court should be of the opinion that there are several acts of omission involved during a given year, yet the language of the statute in question and the authority of this Court as expressed in its decisions lead to the conclusion that if an offense at all was contemplated for the failure to file the information set out in Section 147, the offense made punishable thereunder is a course of conduct rather than separate individual acts. The statute itself indicates that it is treating as one offense all violations that "arise from that singleness of thought, purpose of action" which is deemed a single impulse. A decision obviously in point in this discussion is that of United States v. Universal C. I. T. Credit Corporation, 344 U. S. 218, which case had under discussion the very point which appellee herein makes. In that case the Government sought to prosecute the defendant corporation in 32 counts for alleged criminal violation of the Fair Labor Standards Act. That Act required an employer to pay "each of his employees" a certain minimum wage, prohibited the employer from employing "any of his employees" for more than a certain number of hours per week unless overtime was paid, and required him to keep records of "the persons employed by him." The statute itself made it unlawful for an employer to violate "any of the provisions

of these sections." Just as in the instant case the Government is here seeking to prosecute the appellee in 101 counts for having made 101 alleged separate payments during the three-year period involved, so in the cited case the Government sought to prosecute the defendant corporation for failure to pay minimum wages, for violation of overtime provisions and for failure to comply with the record keeping requirements, and the various counts charged violations as to separate work weeks and as to separate employees. In that case the District Court had dismissed all but three of the counts, one for each section of the statute violated, and on appeal by the Government to this Court, it was held that the alleged offense in question and made punishable under the Fair Labor Standards Act was a course of conduct rather than a series of separate alleged offenses. The decision of the District Court was therefore affirmed by this Court.

Applying the principles of the cited case to the one presently before this Court, we should in determining the allowable unit of prosecution utilize all things possible that express the purpose of Congress in enacting the particular legislation. This is particularly true in the instant case, where we are dealing with a statute which, according to the Government's point of view, defines conduct entailing penalties and prison. And, just as in the Universal C. I. T. case, when we are choosing between two readings of a Federal statute, if we are here dealing with a criminal statute, we should before we read the statute in a manner which would permit the prosecution of a person in 101 counts for 101 payments, and thus subject him to very stern punishment require that Congress should have spoken in language that is clear and definite, and not arrive at such conclusion from ambiguous implications from the statute. Here, just as in the cited case, if Congress had intended that each separate failure to file Form 1099 was to constitute a separate offense, it could have

particularly so stated in the terminology of the statute. Since the statute is not decisively clear on its face and is inexplicit in its language, the Government's construction, so harsh and arbitrary in its nature, cannot stand. The Government has sought to distinguish the Universal C. I. T. case, but states merely that in that case this Court simply found a Congressional purpose to punish a course of conduct rather than an employer's failure to perform his obligations as to each employee. The Government fails to state, however, in what respect the facts of this case differ from the Universal C. I. T. case or how here Congress could not just as easily have prescribed that each failure to file a separate Form 1099 would constitute a separate offense. In this regard it is further obvious that the cases cited by the Government in support of its contention that the allowable unit of prosecution in this case is the failure to file each separate Form 1099 are not applicable to the issues herein. For in the case of Blockburger v. United States, 284 U. S. 299, the prosecution arose out of two separate narcotic sales, even though they occurred within the space of two days. In that case this Court pointed out that the Narcotics Act did not create the offense of **engaging in the business** of selling these certain drugs but penalized any **sale** made in the absence of the qualifying statutory requirements. In that case the acts forbidden by the statute were completed upon the termination of each particular sale. All of the statutory elements of the offense had thereupon taken place and each particular sale was the subject of a successive impulse. As pointed out therein the test of whether a course of action is prohibited by a statute or whether each particular act is prohibited is whether the impulse for the act is single or multiple. So in the case of Ebeling v. Morgan, 237 U. S. 625, the defendant was convicted of cutting six separate mail bags of the United States with intent feloniously to steal the contents thereof. In ruling that each cutting of

a separate mail bag constituted a separate offense, this Court held that after the cutting of each particular mail bag with the prescribed intent the offense prohibited by the statute was completed. Irrespective of any attack on any other bag, that particular offense containing all of the statutory elements was committed each time a mail bag was cut. That case was distinguished from those charges of continuous offenses where the crime is, by reason of its very nature, a single one though committed over a period of time.

It is obvious that the type of offenses set out and discussed in those cases are different entirely from the offenses charged against this defendant. For here, if the statute sets out a criminal offense, that offense and all of the elements thereof were not completed and did not terminate after each payment or alleged transaction by the defendant with the 101 respective payees set out in the 101 counts of the indictment. After the transactions and the individual alleged payments were made no offense, if any, was committed until February 15th of the following year when, under a single impulse or purpose, the defendant omitted to file the informational forms with the Commissioner of Internal Revenue. Up until that time no offense whatever could obviously have been charged against him. It can scarcely be said, therefore, that an offense was committed by the defendant at the time of the individual payment to the individual payee, under the assumption that at that time the defendant intended not to file an informational report as to such payment. For the statute certainly does not penalize an intention in the mind of the payor, but rather his wilful failure to file such a form. Compare United States v. Costello, 2 Cir., 198 F. (2d) 200, 204, in which it was held that where a witness is called before a Congressional investigating committee to give testimony and refuses to answer various questions before such committee on

a specified day, there could be only one contempt against the committee, and the committee could not multiply his contempt by continuing to ask him questions which were followed by his refusal to answer.[15] That case, wherein the committee was seeking to obtain from the witness various different matters of information through separate questions, is analogous to the instant case wherein the statute requires information to be furnished as to various persons and various payments.

Also pertinent to this general argument is the case of Viereck v. United States, 318 U. S. 236, 241, involving a prosecution for wilful omissions to state facts in registration statements filed by the defendant with the Secretary of State in violation of an Act requiring the registration of certain agents of foreign principals. This Court, in its opinion, reiterated the rule that a person "may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." It therefore follows that the Commissioner in promulgating regulations specifying the number of information forms required to be filed by a taxpayer may not thereby multiply the number of offenses and the amount of punishment.

The discriminatory nature of the Government's contention that it be entitled to prosecute the defendant on 101 separate charges is illustrated by the fact that under the Government's theory, if a taxpayer fails to file his own income tax return, he is liable to only one prosecution, no matter how many separate transactions go into his indi-

15. A conspiracy under 18 U. S. C. 371 to evade or defeat the payment of a Federal income tax over a stated period of time which was based on a continuing single agreement is only one continuous offense. Braverman v. United States, 317 U. S. 49. The purchase of several containers of Narcotics at the same time and place is one offense. Anderson v. United States; 6 Cir., 189 F. (2d) 202, 204. See also Alabama Packing Company v. United States, 5 Cir., 167 F. (2d) 179, 182; Braden v. United States, 8 Cir., 270 F. 441, 444.

vidual return. However, if he files his own income tax return, and fails to file Form 1099 as to ten particular payments made by him during the year, he would, under the Government's theory, be chargeable with ten separate offenses. Again, if a taxpayer fails to keep records which show his payments to other persons he is subject to only one offense under the criminal statutes. On the other hand, under the Government's contention, if he does keep such records, which records are open to inspection by the Bureau of Internal Revenue, but fails to file Form 1099 as to such payments, he is again guilty of multiple offenses. Similarly, a taxpayer called by a revenue agent for questioning who refuses to give information concerning his receipts and disbursements and fails to answer a series of questions can be prosecuted for only one offense (United States v. Murdock, 290 U. S. 389), whereas here the taxpayer's failure to supply information as to disbursements made by him through payments to others is made the subject of a series of charges. Carrying the analogy one step further would the Government contend, in the event it was required of a taxpayer to list in separate schedules attached to his income tax return the number of persons who had paid him $600.00 or more during a given year, that the failure to file each such schedule would constitute a separate offense for each failure to list each individual source of his income?

3. A history of the Revenue Acts since the institution of the current income tax laws in 1913 also leads to the conclusion that there can be only one offense for failure to file a return in any given year. The Revenue Act of 1913, C. 16, § II, 38 Stat. 166, was enacted subsequent to the ratification of the 16th Amendment. The returns required under this Revenue Act were required to be filed by the payors of income. It provided that on or before March 1st a true and accurate return should be filed under oath or affirmation and that persons, firms and companies which

have the control of receipts, disposal or payment of fixed or determinable annual or periodic gains, profits and income, should in behalf of the person subject to the tax deduct and withhold the amount of the income tax and should make and render a return of the income of such persons. 38 Stat. 168. The person who was the recipient of the income could file with the withholding agent a signed notice claiming the benefits of any exemptions and deductions provided by law. The recipient was also required to file with the withholding agent a true and correct return of his income from all sources and this return became a part of the return to be made on his behalf by the person required to withhold and pay the tax. The penalty section, being subdivision F, at page 177, provided that if any person or corporation liable to make "the return or pay the taxes aforesaid shall refuse or neglect to make a return" such person shall be liable to a penalty of not less than $200.00 nor more than $1,000.00. The penalty section then went on to provide that any person required by law to make, sign or verify a return who made a false or fraudulent return or statement with intent to defeat or evade the assessment would be guilty of a misdemeanor and should be fined an amount not exceeding $2,000.00 and be imprisoned for a period not exceeding one year. 38 Stat. 171.

Thus, under the Revenue Act of 1913, it was clear that there was only one return and that this return was filed by the withholding agent. The recipient who wished to obtain credit for any deductions or exemptions would file a statement with the withholding agent and this became part of the return. In the instant case the forms required under Section 147 also became part of the income return of the payee. This is apparent under the statute (Title 26, U. S. C. 55) and the Regulations issued pursuant thereto dealing with publicity of returns. Indeed, this is conceded by the Government in its Brief (page 26) where it

is stated that Forms 1099 become associated with the income tax return of the payee taxpayer.

The Revenue Act of 1916 replaced the withholding requirement and required the individual recipient of the income to file his own return (the withholding agent was still required to withhold payment for non-resident aliens and interest from corporate bonds containing a tax free covenant provision).[16] This Act contains no indication nor does its legislative history indicate that Congress wished to multiply the number of offenses under the penalty provisions of the Act. The law still required one income return and merely shifted the onus of filing that return from the payor to the payee.

The Government in support of its contention that there can be a prosecution in multiple counts for failure to comply with the provision of Section 147 during a given year cites the payroll withholding provisions of the Revenue Act of 1942.[17] The Government, however, overlooks two significant amendments made to the Revenue Act of 1942 dealing with the abolition of the requirement that returns be filed under oath and with the amendment to Section 145 which provides that the failure to file a declaration may constitute an offense. Section 136[18] of that Act amended Section 51 of the Code and changed that statute from requiring individuals to make a return under oath to the requirement that the return be verified by a "written declaration that it is made under penalties of perjury."

Section 145 (c) was also added by the same section of that Revenue Act, and made it a felony for any individual to wilfully make and subscribe a return which he does not believe to be true and correct as to every material matter. This subsection made the perjury penalty applicable to a

16 Revenue Act of 1917, c. 63, § 1204, 40 Stat. 331, which amended § 8 of Revenue Act of 1916, c. 463, 39 Stat. 761.

17 C. 619, 56 Stat. 798, 884.

18 56 Stat. 828, 836.

return, although an oath was no longer required.[19] Of this the Senate Committee reported (S. Rep. No. 1631, 77th Cong., 2nd Sess., 1942-2 Cum. Bull. 504, 507):

> "The income tax law has always specifically provided that returns must be made under oath. This requirement causes considerable annoyance and inconvenience to taxpayers in that their returns must be sworn to before a notary public or other similar officers. Your committee bill removes this necessity by substituting for the requirements of an oath the requirement of a written declaration that the return was made under the penalties of perjury."

Thus the same Senate Report relied upon by the Government in its contention that multiple offenses can be committed recognized the fact that a return is a document that must be verified. Although this Act changed the oath requirement to a declaration requirement, nowhere in a Form 1099 is there either an oath or a declaration requirement. It thus can be seen that Congress at the time of the enactment of the current withholding tax law did not recognize that Form 1099 was a return within the meaning of the Act since the legislators considered a return as a document which was required to be filed under oath. This recognition by Congress would support the holding of the District Court in deciding that since Form 1096 contained a declaration that it was executed under penalties of perjury, Form 1096 was the form required by law.[20] Again the enactment of 145 (c) dealing with false returns is a recognition that a "return" either has to be verified by

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[19] Prior to the enactment of Section 145 (c) in 1942, persons filing a false oath to a tax return were subject to the penalties of perjury. United States v. Noveck, 272 U. S. 202, 206. Section 145 (c) has been replaced by Section 3809 of the Code.

[20] Said declaration is as follows:

> "I hereby declare under the penalties of perjury to the best of my knowledge and belief the accompanying reports on Form 1099 and Form 1099L, and/or the statements on the reverse of this form, including any accompanying schedules, constitute a true and complete return of payments of the above described classes of income made by the person or organization named during the calendar year 1950."

oath or by a written declaration setting forth that it is made under the penalties of perjury.

Apparently the Government's principal argument in this regard is that the enactment by Congress in 1942 of the withholding tax provisions was a recognition that the failure to file forms required under Section 147 was a criminal offense. S. Re. 1631, 77th Cong., 2d Sess., p. 172, is cited by the Government. It stated:

> "Section 470 provides criminal and civil penalties for the wilful failure of any employer to furnish a receipt to the employee showing the information required under this supplement or regulations made pursuant thereto or for furnishing a false or fraudulent receipt."

The Government argues that the committee in saying that "these penalties are prescribed in lieu of the penalty imposed by Section 147 of the Code, and are much less severe than those displaced" had reference to the information required under Section 147. This interpretation is in error. First, it could be argued that the failure to furnish a receipt after withholding a tax is an equivalent of the withholding return initially required by the Revenue Act of 1913 or an equivalent of the continuous requirement in regard to the withholding of income payable to non-resident aliens under Section 143. Further, it can be said that the severe penalty which was alluded to by this report referred to Section 145 (b) or to Section 145 (c). A "false or fraudulent receipt" may be an attempt to defeat and evade a tax. Cf. United States v. Beacon Brass Company, 344 U. S. 43. Also Section 145 (b) provides that "any person required * * * to collect, account for, and pay over any tax * * * who wilfully fails to collect or truthfully account for and pay over such tax * * * shall be guilty of a felony * * *." An employer who failed to furnish a receipt or failed to account to the Government

after collecting a tax might be guilty under this subsection of the Act.

Section 1626 (a) provides a criminal penalty for the wilful failure of any employer to furnish a statement or to furnish a false or fraudulent statement. It states that for each such failure there shall be a fine of $1000.00 or imprisonment of not more than one year or both. Section 1626 (b) provided a civil penalty for the same offenses set out in subsection (a) and subsection (c) provided a civil penalty for failure of an employer "to make return or pay the tax." Here again, as is common throughout the Code, where criminal penalties are provided, civil penalties are also prescribed. The failure of an employer to file a return may constitute a failure to file a statement within the meaning of subsection (a). It should be noted that Section 1622 (d) provides that if the employer fails to deduct and withhold, and thereafter the tax is paid, the tax so collected shall not be collected again from the employer. However, this subsection states that the employer is not relieved from liability or any penalties or additions to the tax otherwise applicable. This is in contrast to Section 143 (e) which relieves a withholding agent who withholds taxes of a non-resident alien from liability to penalties. The existence of this section is again indicative of the fact that if Congress had intended penalties to apply for the failure to furnish information under Section 147, then a similar section of the Act would have been enacted.[21]

There are also strong policy reasons for the requirement of a severe penalty in the case of a withholding agent. First, he collects money for the Government and if he fails to furnish an employee a receipt it would be difficult for the employee to check both on the amount of tax withheld

[21] Regulation 116, Section 405.601, prescribes a Form 941 for the payment to the Government of the income tax withheld. This form must be verified by written declaration that it is made under the penalties of perjury. A Form W-3 which lists the number of withholding statements forwarded must be filed, but is not a counterpart of Form 1096, since it is neither signed nor verified by written declaration.

and also on the amount of his income. Especially is this true since any person whose gross income consists solely of salary, wages or similar compensation for personal services rendered is not required to keep books and records showing the amount of his income,[22] and may at his election use a simplified return, Form 1040A, provided that his gross income is less than $5,000.00 and his income from sources other than wages does not exceed $100.00.[23] These Regulations remove the burden of keeping records from the employee to the employer. The failure of the employer to furnish these statements would nullify the effectiveness of these Regulations. Further, both former Section 1626 and present Section 1633 of the Act specifically provide a criminal and civil penalty "for each such failure". If Congress had deemed it advisable to provide a penalty for each failure to comply with Section 147 in a given year the statute specifically could have stated that fact. Further, the fact that Section 1626 was enacted subsequent to Sections 145 and 147 and that Congress found it necessary to include the "for each such failure" clause in Section 1626, would indicate that the failure to comply with Section 147 could not constitute more than one offense per year. The fact that Section 1625 (b) allows withholding statements to be treated as an information return is an indication that Congress did not mean for the word "return" under this Section to be used in a technical sense, for nowhere in this Act other than the penalty section and in this Section does it refer to the word "return".

The Current Tax Payment Act of 1943[24] amended Section 145 (a) of the Code by making it a criminal offense to fail to file a declaration of estimated tax. There would have been no need for this amendment unless Congress had recognized the fact that the word "return" was a specific type of individual income return. If Congress had believed

[22] Regulation 111, Section 29.54-1.
[23] Regulation 111, Section 29.51-2.
[24] C. 120, sec. 5 (c), 57 Stat. 144.

that the word "return" was broad enough to include any type of information required to be filed under the Code, then the failure to file a declaration would have been an offense under Section 145 before the amendment. In other words, the word "return" in 145 (a) would have been broad enough to indicate a "declaration" of estimated tax. Since, however, Congress did not think it was broad enough to include such a "declaration," it follows that the word "return" is not broad enough to include any information required under Section 147.

In 1949 Congress in Public Law 271[25] amended Section 3809 of the Code. The amendment to the section gave the Commissioner authority to eliminate the oath in the case of corporate, fiduciary, partnership, estate and gift tax returns. Here again there is a recognition by Congress that a "return" under Section 145 must be a return under oath or one containing a verification in lieu of an oath.

These statutes make it apparent that Congress in enacting the various Revenue Acts has always considered a "return" to be a document filed either under oath or filed under a declaration that the subscriber is subject to the penalties of perjury. The historical background of the income tax law also indicates that there can be only one "return" per individual or taxable unit during a given taxable period and that any other statements which are required to be filed by others merely become a part of this annual return.

CONCLUSION.

For the reasons stated above, it is submitted that the judgment of the District Court in this case should be affirmed.

Respectfully submitted,

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[25] C. 517, sec. 4 (a), 63 Stat. 667.

APPENDIX.

Internal Revenue Code:

Sec. 145. Penalties.

(a) **Failure to file return, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required tax by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penal-

ties prescribed for perjury in section 125 of the Criminal Code.

(d) **Person defined.** The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

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Sec. 147. Information at source.

(a) **Payments of $500 or more.** All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income (other than payments described in section 148 (a) or 149), of $500 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.

(b) **Returns regardless of amount of payment.** Such returns may be required, regardless of amounts, (1) in the case of payments of interest upon bonds, mortgages, deeds of trust, or other similar obligations of corporations, (2) in the case of payments of interest upon obligations of the United States or any agency or instrumentality thereof, and (3) in the case of collections of items (not payable

in the United States) of interest upon the bonds of foreign countries and interest upon the bonds of and dividends from foreign corporations by persons undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange.

(c) **Recipient to furnish name and address.** When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.

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Treasury Regulation 111, promulgated under the Internal Revenue Code. Sec. 29.145-1. Penalties.

The penalties provided for in section 145 cannot be assessed but are enforceable only by suit or prosecution. For limitations on prosecutions, see section 3748 (paragraph 87 of the Appendix to these regulations). The willful failure of a taxpayer to give information required in his return as to advice or assistance rendered in the preparation of the return, and the willful failure of the person preparing a return for another to execute the sworn statement required with reference thereto, make such persons subject to the penalties imposed by section 145 (a). An individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, is guilty of a felony, and, if convicted, may be fined not more than $2,000 and imprisoned not more than five years (see Criminal Code, section 125, 18 U. S. C., 1940 ed., 231) (now 18 U. S. C., § 1621). The privilege against incrimination in the fifth amendments to the Constitution is not a defense to a charge of failure to file a return, and does not authorize a refusal to state the amount of income, though the taxpayer's income was made through crime.

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Sec. 29.147-1. Return of Information as to Payment of $600 ($500 for Years Prior to 1948).

All persons making payment to another person of fixed or determinable income of $500 or more in any calendar year prior to 1948, and all persons making payment to another person of such income of $600 or more in any calendar year after 1947 must render a return thereof for such year on or before February 15 of the following year except as specified in sections 29.147-3 to 29.147-5, inclusive. A return shall be made in each case on Form 1099, accompanied by transmittal Form 1096 showing the number of returns filed, except that the return with respect to distributions to beneficiaries of a trust or of an estate shall be made on Form 1041 in lieu of Forms 1099 and 1096. Returns of information on Forms 1096, 1099, and 1099L should be filed with the Commissioner of Internal Revenue, Processing Division, C. C. Station, Kansas City 2, Mo.[26] For place of filing Form 1041 see section 53. The street and number where the recipient of the payment lives should be stated, if possible. If no present address is available, the last known post-office address must be given. Although to make necessary a return of information the income must be fixed or determinable, it need not be annual or periodical. (See section 29.143-2.)

Sums paid in respect of life insurance, endowment, or annuity contracts which are required to be included in gross income under sections 29.22 (b) (1)-1, 29.22 (b) (2)-1, and 29.22 (b) (2)-2 come within the meaning of the term "fixed or determinable income" and are required to be reported in returns of information as required by this section, except that payments in respect of policies surrendered before maturity and lapsed policies need not be reported.

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[26] Prior to the amendment which was published in the Federal Register on February 24, 1949, (T. D. 5687, 1949-1 Cum. Bull. 9, 32), the address of the Processing Division given in the regulation was "260 East One Hundred and Sixty-first Street, New York 51, N. Y."

Fees for professional services paid to attorneys, physicians, and members of other professions come within the meaning of the term "fixed or determinable income" and are required to be reported in returns of information as required by this section.

For the purpose of a return of information, an amount is deemed to have been paid when it is credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and which is made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition.